Journal of Legislation

Volume 27 | Issue 2 Article 1

5-1-2001

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ARTICLES

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I. INTRODUCTION

Informants are the life blood of any law enforcement agency. They provide the tips that help solve crimes and prevent others. It is necessary to use information provided by these individuals, of usually less than sterling character and reputation, who live and function within the criminal element itself. The use of informants remains one of law enforcement's oldest and most essential investigative tools.

These are expanding times for both the sellers and buyers of cooperation in the federal criminal justice system. Although prosecutors have always welcomed the assistance of informants, the sentencing laws have become tougher since the enactment of the Federal Sentencing Guidelines. This has led to a significant increase in cooperation as more defendants try to provide "substantial assistance in the investigation or prosecution of another person."[1] To put it bluntly, these snitches agree to cooperate hoping to receive a significant sentence reduction. However, prosecutors possess the power of deciding which defendants are eligible for a substantial assistance departure, because the court cannot depart below the applicable guideline range on the basis of a defendant's substantial assistance without a motion from the prosecutor requesting such departure. This has bestowed upon the prosecutor a tremendous and often problematic amount of power over substantial assistance.

This Article focuses upon the problems surrounding this grant of discretion to the prosecutor in §5K1.1. Part II discusses the history of the Federal Sentencing Guidelines and the Sentencing Reform Act of 1984. Part III describes the three main types of government informants. Part IV examines the disadvantages of prosecutorial control over

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1. UNITED STATES SENTENCING GUIDELINES MANUAL §5K1.1 (1997).

substantial assistance departures. And, Part V discusses my proposal for a pre-sentence substantial assistance hearing before a neutral and detached magistrate judge.

II. HISTORY OF THE FEDERAL SENTENCING GUIDELINES

The tension between discretion and rules has been a powerful force motivating the creation of the Federal Sentencing Guidelines. Before the Guidelines, judges had broad discretion in sentencing. A sentencing judge could impose any sentence that he or she felt was appropriate as long as it did not exceed the statutory maximum.[2] The judge was not required to articulate the reasons for his sentencing decision and the length of the sentence was not subject to appellate review.[3] The biggest problem with this system of broad discretion in sentencing is that it led to disparate treatment of similarly situated individuals.

Due to the great measure of unrestrained judicial discretion and indeterminate sentences, the federal government recognized the need to standardize criminal statutes and sentencing provisions. This sentiment brought about the passage of the Sentencing Reform Act[4] of 1984 (S.R.A.) and its three goals.[5] The first of these three goals of the S.R.A. is honesty, which is achieved by providing for sentences that represent close approximations of the actual time that defendants would serve in prison. The second goal is uniformity, which is achieved by promoting consistency between the sentences imposed for "similar criminal offenses committed by similar offenders." The third goal is proportionality, which is the developing of sentence lengths that correlate with the severity of the offense committed.

"The American judicial system has always rewarded criminal defendants who testify against their fellows, customarily by reducing the cooperating defendant's sentence."[6] Prosecutors historically have entered into agreements with cooperators to drop or not file certain charges, or to recommend a lower sentence that might otherwise appear appropriate.[7] However, prior to the passage of the S.R.A. and the ensuing adoption of the Federal Sentencing Guidelines, cooperation agreements were certainly a less prominent feature than they are today.[8] The stated objectives of the S.R.A. were:

1. To promote certainty in sentencing by mandating real-time sentencing and

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2. *See* Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 U.C.L.A. L. REV. 83, 89 (1988).

3. *See id.*

4. *See id.*

5. U.S.S.G. § 1A3.

6. Frank O. Bowman III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 13 (1999) (citing Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7-8 (1992)).

7. United States Sentencing Commission, *An Overview of the Federal Sentencing Guidelines* (visited Feb. 10, 2001) <http://www.ussc.gov> [hereinafter *An Overview of the Federal Sentencing Guidelines*].

8. *See id.*

eliminating the possibility of parole before the imposed sentence is fully served;
2. To require district court judges to state their reasons for imposing a sentence;[9]
3. To achieve proportionality in sentencing;[10]
4. To reduce unwarranted sentencing disparity,[11] and;
5. To establish a Sentencing Commission charged with the development of guide lines to guide the discretion of judges in imposing sentences.[12]

The primary congressional focus driving the enactment of the S.R.A. was the desire to control unwarranted sentencing disparity inherent in an indeterminate sentencing system and the individualized sentencing model.[13] The S.R.A. mandates that the Federal Sentencing Commission produce "certainty and fairness in meeting the purpose of sentencing, avoiding unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . ."[14]

Thus, the Commission utilizes standardized factors to determine individual punishments for defendants convicted of similar offenses. The resulting federal sentencing guideline system computes numeric offense seriousness levels based upon the defendant's behavior, the scope of the offense, offense-specific aggravating and mitigating factors, and general culpability adjustment criteria.[15] Guideline sentence ranges are then determined from a matrix using numeric offense levels and criminal history seriousness measures that capture the length, seriousness and recency of the defendant's criminal past.[16] After the guideline range is determined, if the court finds that there is a factor that the guidelines did not adequately consider, it may "depart" from the guideline range.[17] The judge may sentence the offender above or below the range.[18] When departing, the judge must state the reason for the departure.[19] If the sentence is an upward departure, the offender may appeal, and if it is a downward departure, the government may appeal.[20]

The S.R.A. and the Guidelines made three changes that dramatically affected the process of bargaining for an agreement to testify in federal court. "First, in the SRA,

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9. Gerald W. Heaney, *The Reality of Guideline Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 162 (1991).

10. *Id.*

11. *Id.* When dealing with confidential informants, two agents always deal with one informant at a time, to ensure safety. Each confidential informant is assigned a code name and number, to ensure confidentiality. When someone notifies an Agency that he or she wants to cooperate, the first thing the agent determines is the motive for their cooperation. *Id.*

12. *Id.*

13. *See id.*

14. 28 U.S.C. § 991(b)(1)(B).

15. *An Overview of the Federal Sentencing Guidelines*, *supra* note 7.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

Congress imposed a stringent minimum mandatory sentence for a number of commonly prosecuted federal crimes, most notably drug offenses."[21] "Second, the Guidelines raised the sentencing ranges for the two most commonly prosecuted federal crimes - drugs and fraud . . ."[22] "Third, . . . for most defendants virtually the only ground on which a departure from these stiff sentences might plausibly be based is "substantial assistance" to the government."[23] "Taken together, these . . . changes . . . radically altered the plea bargaining environment and created powerful, indeed often irresistible, incentives for defendants to cooperate with the government."[24] "In effect, motions for substantial assistance departures filed by federal prosecutors increased steadily in the years following 1987, and by 1994, the government made substantial assistance motions in nearly 20% of all federal prosecutions."[25]

Needless to say, the most common ground for departures from the otherwise applicable sentencing range is cooperation with the government in the prosecution of others, or "substantial assistance."[26] This downward departure may be granted if the offender has provided substantial assistance in the investigation or prosecution of another offender. Pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. §5K1.1, the Government may move for departure from the applicable guidelines sentence, but may not move for departure from the applicable mandatory minimum sentence.[27] The decision to file the motion rests solely within the Government's discretion, but is subject to constitutional limitations.[28] Section 5K2.0 of the sentencing guidelines allows the sentencing court to depart only if the aggravating or mitigating circumstances supporting the departure are "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."[29] In *United States v. Justice*[30], the Eighth Circuit Court of Appeals held that a defendant's substantial assistance to authorities was not a mitigating circumstance of a kind "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines"[31] within the meaning of 18 U.S.C. §3553(b) since §5K1.1 of the sentencing guidelines already deals with a defendant's substantial assistance.[32] The

21. Bowman, *supra* note 6 at 13 (citation omitted).

22. *Id.* at 14 (citations omitted).

23. *Id.* at 14-15 (citation omitted).

24. *Id.* at 15.

25. *Id.* (citation omitted).

26. *See id.*

27. *See* Melendez v. United States, 518 U.S. 120 (1996) (stating that a motion pursuant to USSG §5K1.1 for departure from the applicable guidelines sentence does not authorize the district court to depart below an applicable mandatory minimum sentence).

28. *See* Wade v. United States, 504 US 181, 185-86 (1992) (indicating that relief would be appropriate if the Government failed to file the motion because of the defendant's race or religion).

29. Cynthia Kwei Yung Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement*, 23 IND. L. REV. 681, 686 (1990) (quoting UNITED STATES SENTENCING GUIDELINES MANUAL §5K2.0 (WEST 1990)).

30. 877 F.2d 664 (8th Cir. 1989).

31. *Id.* at 666.

32. *See id.*

holding of the *Justice* court suggests that §5K2.0, which parallels 18 U.S.C. §3553(b), does not give the court discretion to depart downward for substantial assistance without a government motion.[33]

A defendant making such allegation, however, has no right to discovery or to an evidentiary hearing absent a "substantial threshold showing" of a constitutional violation.[34]

Further, in noting that a showing of assistance is a necessary condition for relief, a prosecutor's withholding of the motion for departure may reflect the Government's "rational assessment of the cost and benefit that would flow from moving."[35] The defendant must render substantial assistance with respect to the investigation or prosecution of someone other than himself.[36] It is within the sentencing court's discretion to deny the Government's motion.[37] "While the court does not have to grant a §5K1.1 motion filed by the prosecution, information obtained by the Commission indicates that the vast majority of motions are granted as a matter of course."[38] "[T]heoretically, the judge has the last word on whether the defendant receives a downward departure for substantial assistance." However, in practice, "the government motion requirement of §5K1.1 gives the prosecutor the ultimate authority to decide whether a defendant will receive such a departure."[39] "The obvious reason for requiring a government motion before a sentencing court can depart downward in recognition of a defendant's substantial assistance"[40] is "to lodge some sentencing discretion in the prosecutor, the only individual who knows whether a defendant's cooperation has been helpful."[41] Not only does the prosecutor determine who should be charged and what the charge should be, but the prosecutor also controls the information that largely determines the time to be served by an offender. The prosecutor's control over the ultimate sentence increases the prosecutor's bargaining power in plea negotiations. Thus, it is believed that the prosecutor is in the best posi-

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33. *See id.*

34. Wade v. United States, 504 U.S. 181, 186 (1992) (citing Brief for Petitioner 26).

35. *Id.* at 186-87.

36. *See* U.S.S.G. §5K1.1, comment (n.2); *see also* United States v. Sanchez, 927 F.2d 1092 (9th Cir. 1991) (holding that a defendant's settlement of civil forfeiture case against his own property did not constitute substantial assistance within the meaning of USSG §5K1.1).

37. *See, e.g.*, United States v. Organek, 65 F.3d 60 (6th Cir. 1995) (stating that the district court was not convinced defendant's cooperation justified a downward departure); United States v. Damer, 910 F.2d 1239, 1240-41 (5th Cir. 1990) (upholding 140 month guideline sentence for distribution of methamphetamine near a public school where district court noted that the guidelines already reduced defendant's sentence substantially below the 80 year statutory minimum); United States v. Fiterman, 732 F.Supp. 878 (N.D. Ill. 1989) (stating that the defendant's information was stale and of no apparent use to the Government).

38. Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, 5 n.11 (Jan., 1998) (visited Feb. 10, 2001) <http://www.ussc.gov/pdf/5kreport.pdf> [hereinafter Maxfield, *An Empirical Yardstick*].

39. Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 U.C.L.A. L. REV. 105, 109 (1994).

40. *See* Lee, *supra* note 29, at 697-98 (quoting United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989)).

41. *Id.*

tion to know whether a defendant has rendered substantial assistance to the government.[42]

The use of informants is now part and parcel of law enforcement work. Informants are invaluable sources of information for every law enforcement agency and are indispensable to agencies that investigate "victimless" crimes, such as the Drug Enforcement Agency and the Federal Bureau of Investigation.[43] The Guidelines have resulted in a massive unintended transfer of discretion and authority from the court to the prosecutor, and the promotion of hidden bargaining between the prosecutor and defense counsel. Since sentencing is probably the most critical point in a trial, crucial decisions respecting punishment should not be made behind closed doors.[44]

III. TYPES OF INFORMANTS

The term "informant" refers to anyone who provides information to a law enforcement agency.[45] The Drug Enforcement Agency and the Federal Bureau of Investigation identify informants as three types. The first are called regular-use informants, who are ordinary citizens who have observed and reported some item of significance.[46] The second are defendant-informants, who are those subject to arrest or prosecution for a federal or state offense, or those who admit to crimes that he or she has committed.[47] Defendant-informants may be further categorized as paid informants or immunized informants. Paid informants are those who receive direct financial remuneration for their information or testimony. Unlike the paid informant, the immunized informant trades information or testimony for leniency regarding charges pending against him. Immunized informants are used widely because law enforcement agencies view a reduced jail sentence as greater inducement than the small amounts of money that they can typically afford to pay.[48] The final category of informants is restricted-use informants, who are informants with many felony convictions or a history of previous arrests. This Article will focus on the immunized defendant-informant.

IV. DISADVANTAGES OF PROSECUTORIAL CONTROL OVER SUBSTANTIAL ASSISTANCE DEPARTURES

When using informants, there is only one buyer for cooperation in each of the 94 districts of the United States: the United States Attorney's Office.[49] Federal prosecutors

42. *See id.*

43. Notes from transcript of an interview with a DEA Agent, Northern District of Ohio, (Feb. 10, 2000). Name withheld on the promise of confidentiality. Notes are on file with the Author.

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 594-95 (1999).

have always used cooperating witnesses and their use is growing.[50] Informants are a powerful law enforcement tool; they make it possible to prosecute crimes that might go unpunished.[51] The use of informants also appeals to federal prosecutors' desire to minimize the risk of acquittals and thus control the outcome of their cases.[52]

On the one hand, placing control over substantial assistance in the prosecutor's office is warranted because the prosecutor is closer to the investigation and thus better able to assess the sufficiency of the defendant's assistance.[53] However, there are countervailing considerations which argue against giving the prosecutor such complete authority to block a departure based on substantial assistance.[54]

A. The Prosecutor as a Biased Advocate

Opponents argue that prosecutors should not be given such complete power to block departures based on substantial assistance because the prosecutor is not a completely neutral and unbiased party.[55] The prosecutor's position of advocate may conflict with Congress's interests in promoting uniformity and reducing unwarranted sentencing disparity.[56] "For example, evidence exists that prosecutors sometimes use plea bargaining to manipulate or circumvent the Guidelines."[57] In a comprehensive study of plea bargaining practices in federal criminal cases, Commissioner Ilene Nagel and Professor Stephen Schulhofer found evidence of guideline manipulation and circumvention through plea bargaining and the filing of substantial assistance motions.[58] Assistant United States Attorneys (AUSAs) admitted using the §5K1.1 motion to "avoid guideline ranges or mandatory minimum sentences for sympathetic defendants" even when these defendants had not rendered substantial assistance.[59] Further, defense attorneys have complained that "AUSAs refuse to file the §5K1.1 motion even after a defendant has fully cooperated."[60] Nagel and Schulhofer concluded that "unfettered prosecutorial discretion . . . may reproduce unwarranted disparity or worse, discrimination based on race, gender, and social class, thereby compromising the goals of the Sentencing Reform Act."[61]

Opponents assert that despite the prosecutor's duty to seek justice, the prosecutor is

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50. *See id.* at 595.

51. *See id.*

52. *See id.*

53. Cynthia Kwei Yung Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 235-36 (1997).

54. *See id.*

55. *See id.* at 235-36.

56. *Id.* at 236.

57. *See id.*

58. Irene H. Nagel and Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study on Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 560 (1992).

59. *See* Lee, *supra* note 53, at 236 (quoting Nagel and Schulhofer, *supra* note 58, at 550).

60. *See* Lee, *supra* note 53, at 236 (quoting Nagel and Schulhofer, *supra* note 58, at 551).

61. *Id.* at 560.

still an advocate in an adversarial system.[62] Once a case has been fully prosecuted, it is difficult for the prosecutor to discharge his or her adversarial hat.[63]

Furthermore, the Federal Judicial Center's (FJC) guideline survey[64] reported that 86% of respondents agreed (and, 57% strongly agreed) that "sentencing guidelines give too much discretion to prosecutors."[65] Further, 74.9% of federal judges and 58.6% of chief probation officers thought that the prosecutor had "the greatest influence on the final guideline sentence."[66] With respect to substantial assistance, the FJC survey also demonstrated a suggestion of inequity in that 59% of judges and 55% of chief probation officers said that they personally had cases on which they believed that the defendant had provided "substantial assistance," but the prosecutor did not make a §5K1.1 motion.[67]

B. Sentence Disparity

Opponents to a prosecutor's discretion to block a departure motion also argue that substantial assistance departures create a sentencing difference between those who are charged with the same offense and do not benefit from these departures, and those who do benefit.[68] For example, there are instances where small dealers get extraordinarily long sentences compared to large dealers as sometimes the large dealers may well have the opportunity to lead the investigators into an international drug smuggling ring of very significant proportions, so that the large dealer will cooperate and get what might appear, to some, to be a less than appropriate sentence.[69] Since drug organizations are now so large and diverse, one can be involved as an unloader, a seller, a mule, or a courier, and thus they are insulated and do not know who the principals are, so very often the smaller dealers have nothing that they can really offer the government.[70] As a result, the larger dealers are in a position where they can testify to receive a downward departure.[71] In these dimensions these sentencing differences are unevenly and unreasonably distributed as a result.

Eric E. Sterling was counsel to the U.S. House Committee, on the Judiciary from 1979-1989, and participated in the passage of the mandatory minimum sentencing laws.

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62. *See* Lee, *supra* note 39, at 171.

63. *See id.*

64. Molly Treadwell Johnson & Scott A. Gilbert, "The United States Sentencing Guidelines: Results of the Federal Judicial Center's Survey," *Report to the Committee on Criminal Law of the Judicial Conference of the United States*, Federal Judicial Center (Dec. 5, 1996).

65. Maxfield, *supra* note 38, at 14-15.

66. *Id.*

67. *Id.*

68. *See* P.B.S. Frontline: *Snitch* (visited Feb.10, 2001) <http://www.pbs.org/wgbh/pages/fron.../shows/snitch>.

69. *See id.*

70. *See id.*

71. *See id.*

Currently, he is President of the Criminal Justice Policy Foundation in Washington D.C., and Co-Chair to the American Bar Association, Committee on Criminal Justice, Section of Individual Rights and Responsibilities. In an interview, he stated that:

> there have been literally thousands of instances of injustice where minor co-conspirators in cases, the lowest level participants, have been given the sentences that Congress intended for the highest kingpins. Families are wrecked, children are orphaned, the taxpayers are paying a fortune for excessive punishment, you know there's nothing conservative about punishing people too much. That's an excess. And it's just a waste. It is such a waste of human life. It's awful.[72]

Moreover, similarly charged defendants are being sentenced differently because policies regulating cooperation practices and the consistency of the application to those policies vary widely from district to district.[73] Each United States Attorney Office is permitted to establish its own internal §5K1.1 processes consistent with legislative and Department of Justice guidance. However, according to the results from the United States Attorney's Office Mail Policy Survey,[74] only four out of five (20.2%) United States Attorney Offices maintained a written substantial assistance policy. Each responding office (100.0%) reported the existence of at least one review or approval procedure; of these, 82.0% reported at least two different procedures.[75]

Clearly, the United States Attorney Offices generally had an infrastructure to review §5K1.1 applications. However, 44.4% of the districts operated in complete consistency with their policy, while 33.3% demonstrated no consistency with their policy. Complete consistency with review policy ranged from 41.2% for review committee policies to 63.2% for Assistant United States Attorney review policies.[76] This, in turn, suggests that districts diverged from their stated policy. Specifically, at a minimum, 15.8% may have completely disregarded their review policies. And the policy review or approval criteria were followed consistently only in approximately one-half to two-thirds (between 41.2% and 63.2%) of the districts.[77]

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72. *Id.*

73. *See* Weinstein, *supra* note 49 at 601.

74. *See* Maxfield, *supra* note 38, at 7 (indicating that as part of the staff working group, a policy survey questionnaire, along with an authorization memorandum from the Director of the Executive Office for U.S. Attorneys, was mailed to each of the 94 U.S. Attorney Offices. A total of 89 completed questionnaires were returned, for a response rate of 94.7%. Five districts elected not to participate in the survey: Alaska, Eastern California, New Hampshire, Oregon and Eastern Wisconsin).

75. *See id.* The single most frequently used procedure (in 77.5% of the districts) involved supervisory assistance (typically a criminal division chief or a divisional chief), although the vast majority (87.0%) of these supervisory review districts also had established at least one other review procedure. Approximately one-quarter (23.6%) of the districts reported a substantial assistance review committee. Committee members frequently included: criminal division chiefs; Assistant U.S. Attorneys (AUSAs) with responsibility for an office division (such as Criminal Division or the Economic Crimes Division); unit leaders; and the U.S. Attorney. *Id.*

76. *See id.*

77. *See id.*

C. No Procedural Check on Prosecutorial Discretion

Finally, opponents of allowing prosecutors' to hold the discretion in determining substantial assistance, challenge this discretion. They maintain that there is no check on the appropriateness of prosecutorial decisions, because there are no procedural mechanisms to check the correctness of this decision. However, in *Wade v. United States*,[78] the United States Supreme Court affirmed the validity of the government motion requirement, acknowledging the broad grant of discretion accorded prosecutors in deciding whether to file a substantial assistance motion.[79] Nevertheless, the *Wade* Court carved out a narrow exception to this general rule of broad prosecutorial discretion.[80]

In *Wade*, the police discovered 978 grams of cocaine, two handguns and more than $22,000 in cash at Harold Wade's house.[81] After his arrest, Wade gave law enforcement officials information that led them to arrest another suspected drug dealer.[82] Subsequently, Wade was indicted by a grand jury for drug possession, distribution, conspiracy, and other federal offenses.[83] Since he was subject to the 10-year minimum, he faced a sentence of 120-121 months.[84] Wade's attorney urged the court to impose a sentence below the 10-year minimum in recognition of Wade's assistance to the government.[85] Since the government had not filed a motion requesting such a departure, the district court refused to sentence Wade below the statutory minimum.[86]

On appeal, Wade conceded that §5K1.1 and 18 U.S.C. §3553(e) both require a government motion as a condition to the judge's authority to depart. However, Wade argued that the prosecutor's discretion to exercise this power was subject to constitutional limitations, and the Supreme Court agreed.[87] The Court clarified that, as a general matter, the district court is not authorized to depart below the applicable guideline range or the statutory mandatory minimum in recognition of a defendant's substantial assistance unless the government files a substantial assistance motion permitting the court to depart.[88] The *Wade* Court thus acknowledged the broad discretion generally accorded prosecutors in making the decision whether to file a substantial assistance motion.[89] The Court, however, carved out a narrow exception to this general rule, and held that district

78. 504 U.S. 181 (1992).
79. *See id.* at 185-86.
80. *See id.*
81. *See id.* at 183.
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.*
87. *See id.* at 184.
88. *See id.*
89. *See id.*

courts "have authority to review a prosecutor's refusal to file a substantial assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive."[90] The *Wade* Court cited an example of a constitutional violation as the refusal to file the motion "because of the defendant's race or religion."[91] Also, a defendant would be entitled to relief "if the prosecutor's refusal to move was not rationally related to any legitimate Government end."[92] The Court also indicated that "a defendant has no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing.'"[93]

Therefore, after *Wade*, the only time that a district court may trump the prosecutor's refusal to file a substantial assistance motion is in the highly unlikely situation in which the district court finds that the prosecutor's refusal to file was based upon an unconstitutional motive or not rationally related to a legitimate government objective. Further, under the Federal Sentencing Guidelines, a sentence within the guideline range is presumptively correct.[94] If the court imposes a sentence within the guideline range, an appellate court may review the sentence only to determine whether the guideline range was correctly calculated.[95] If the court departs from the applicable guideline range, then an appellate court may review only the reasonableness of the departure.[96] Virtually unreviewable discretion is problematic, since this lack of review, inherent in pre-Guideline judicial discretion, led to charges of unwarranted sentence disparity and the passage of the Sentencing Reform Act.[97]

V. PROPOSAL: SUBSTANTIAL ASSISTANCE PRE-SENTENCE HEARING

The government motion requirement gives the prosecutor unbridled discretion in making substantial assistance determinations. Thus, when the parties come before the court they may not be able to agree on whether the defendant-informant has provided substantial assistance. In cases where the defendant-informant has provided some assistance, the prosecutor may find that the assistance was insufficient to rise to the level of substantial. While, on the other hand, the defendant-informant may believe that the assistance that he or she provided merits departure in sentencing.

Therefore, the resolution of such disputes should not be left to the federal prosecutor's decision-making. Even though the prosecutor's job is to seek justice, the prosecutor is still a biased player in the criminal proceeding. The prosecutor acts zealously to con-

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90. *Id.*

91. *Id.* at 185-86.

92. *Id.* at 186.

93. *Id.* (citation omitted).

94. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL at 1 (West 1993).

95. *See id.*

96. *See id.*

97. *See* Lee, *supra* note 53, at 251.

vict defendants on trial. Therefore, the role of the prosecutor becomes difficult when it is time to be objective regarding the imposition of a sentence.[98] Thus, the government motion requirement undermines the value of fairness to the defendant-informant because it places ultimate authority over the substantial assistance determination in the hands of the prosecutor, who is one of the parties to the litigation.

Since the prosecutor's decision on whether to file a substantial assistance motion traditionally occurs after a defendant-informant has been convicted or pled guilty, the motion is filed right before or during the sentencing hearing. The court may not inquire into the reasons for a prosecutor's decision not to file a substantial assistance motion, unless there is some reason to believe the prosecutor was motivated by an impermissible ground such as race, religion, or other arbitrary classification.[99] If the prosecutor's assessment of the defendant-informant's assistance as insubstantial and not deserving of a substantial assistance motion is incorrect, there are no procedural mechanisms to check the correctness of this decision because, under the Federal Sentencing Guidelines, a sentence within the guidelines is presumptively correct. If the court imposes a sentence within the guideline range, an appellate court may review the sentence only to determine whether the guideline range was correctly calculated. If the court departs from the applicable guideline range, then an appellate court may only review the reasonableness of the departure.[100]

The values of equality and fairness to the individual defendant-informant can be achieved by restricting the prosecutor's discretion regarding substantial assistance and shifting this discretion to a neutral and detached magistrate judge. Magistrate judges serve as adjuncts to Article III district court judges.[101] Congress has clearly provided that a magistrate judge's role is to assist Article III judges rather than serve as a lower-tier court.[102] Deciding whether and to what extent a defendant-informant provided assistance to the government and therefore deserves leniency, involves a weighing of the evidence and a balancing of interest, which is an adjudicatory function judges perform regularly. Removing the government motion requirement and allowing a neutral and detached magistrate judge to make the ultimate decision of whether a defendant-informant deserves a downward departure in his or her sentence is much more equitable to the defendant-informant than having the prosecutor, an advocate of the adversarial system, make this determination. Thus, a neutral and detached magistrate judge is needed to evaluate the assistance provided by the defendant-informant and to determine whether or not the assistance rises to the level of substantial assistance.

The practical concern that defendant-informants would routinely file substantial as-

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98. *See* Lee, *supra* note 29, at 701.

99. Wade v. United States, 504 U.S. 181, 185-86 (1992).

100. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL at 1 (West 1993).

101. Interview with Judge George J. Limbert, Federal Magistrate Judge, Northern District of Ohio, in Youngstown, Ohio (Feb. 10, 2000) [hereinafter *Judge George J. Limbert*].

102. *See id.*

sistance motions might not be as ominous as it appears, since magistrate judge dockets are not as demanding as Article III federal judge dockets. The magistrate judge's docket is not as congested, which makes it easier for the magistrate judge to handle these pre-sentence motions.[103] Thus, the magistrate judge would be in the best position to preside over these pre-sentence hearings, so that the Article III federal judges would not be burdened with substantial assistance motions. Thus, the Article III federal judge would have the option to refer the pre-sentence substantial assistance hearing to a magistrate judge in the interest of judicial economy.[104]

A pre-sentence substantial assistance hearing would return indeterminate[105] sentencing discretion to the judge. However, in response to the practical concern that judges might use substantial assistance as a back door way of returning to the indeterminate sentencing discretion that they once had before the promulgation of the Federal Sentencing Guidelines, there should also be a limit on how much the magistrate judge can downwardly depart.[106] One means of limiting the magistrate judge's discretion would be to impose a two to five level departure based on the defendant-informant's substantial assistance. This is necessary to avoid the widespread sentencing disparity which was prevalent during pre-Guideline days and which still poses a problem today.[107]

In essence, this would give the magistrate judge some discretion, but would also place a limit on the judge's discretion so that the goals of equality and reliance are achieved.

A. Format of a Substantial Assistance Pre-sentence Hearing

Prior to bargaining negotiations, the prosecutor must debrief the defendant-informant. Through debriefing the prosecutor would need to find out what the defendant-informant knows about the crime and how the defendant-informant came to know it. The debriefing should be thorough and provide the prosecutor with facts that can be corroborated. Before meeting with the defendant-informant, the prosecutor should develop an understanding of what the defendant-informant should and should not be able to say.

Based on the information gathered during the debriefing, the prosecutor would have

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103. *See id.*

104. *See id.*

105. *See id.* Indeterminate sentences impose a minimum and maximum incarceration term upon an offender with the possibility of release or parole sometime between the expiration of those terms. The date and conditions of any release before the maximum term is generally determined. The system rests upon the rehabilitative rationale and originated in the late nineteenth century. Under this approach the primary purpose of incarceration is to rehabilitate, not punish, offenders since the amount of time needed for this purpose varies with each individual and cannot be known precisely at the time sentence is imposed. Indeterminate terms give offenders an incentive to cooperate in their rehabilitation by promising them freedom when sufficiently improved. ARTHUR W. CAMPBELL, THE LAW OF SENTENCING (2d ed. 1991).

106. *See* Lee, *supra* note 39, at 148.

107. *See* Lee, *supra* note 29, at 681.

the discretion to decide whether to present to the defendant-informant the option of assisting the government. Once the prosecutor decides that the defendant-informant would be of value in the assistance of the investigation or prosecution of another person who has committed an offense, it would then be in the defendant-informant's discretion to decide whether to cooperate with the government. The practical effect of this would not undermine the prosecutor's ability to prosecute cases, because during the bargaining negotiations, the prosecutor would have the opportunity to tell the defendant-informant that he will either support or oppose the defendant-informant's substantial assistance motion. Thus, with a promise of support the prosecutor retains some control over compelling cooperation.

After the defendant-informant assists the government, the burden would be placed on the defendant-informant to make a §5K1.1 substantial assistance motion requesting this pre-sentence hearing, which would take place immediately prior to sentencing. The burden would be placed on the defendant-informant because the defendant has first-hand knowledge of the amount and extent of his cooperation. This would give the defendant-informant some control over whether and with what degree of force §5K1.1 would come into play.[108] Therefore, the prosecutor would no longer have the power to promise the filing of a substantial assistance motion, since the assistance provided by the defendant-informant would be evaluated by a magistrate judge. The defendant-informant would testify first as to what he did to assist the government and then he would be subject to cross-examination by the government. The defendant-informant would also be afforded the opportunity to present witnesses and/or independent evidence to substantiate his assistance.

Once the defendant-informant has rested his case, the government would present its assessment of the defendant-informant's assistance, as well as any evidence to refute the defendant-informant's position. The government's assessment of the defendant-informant's assistance would still be important as the magistrate judge would likely rely heavily on the prosecutor's opinion. Just as the defendant-informant, the government would have an opportunity to present witnesses on its behalf, such as DEA and FBI agents. Government agents would be subject to cross-examination as well. Thereafter, both parties would have closing arguments. The magistrate judge would then make a determination as to whether or not the assistance the defendant-informant provided the government rose to the level of *substantial* assistance.

In order to assess whether the defendant-informant did, in fact, substantially assist the government, all magistrate judges would make this determination by evaluating the defendant-informant's substantial assistance in light of eight factors: four objective factors and four subjective factors.[109] The magistrate judge would examine both the objec-

108. For the most part, the defendant-informant would voluntarily decide whether to provide assistance to the government and the many attributes which comprise the substantiality of his assistance, such as timing and degree.

109. Under the current system, the factors to be used by the prosecutor prior to sentencing in determining

tive factors and the defendant-informant's subjective purpose. The magistrate judge would balance these factors to determine whether, under the totality of the circumstances, the defendant-informant's conduct rises to the level of substantial assistance.[110] These factors would give the magistrate judge a framework for evaluating the defendant-informant's cooperation. The objective factors that the magistrate judge would consider should be:

1. The testimony of government agents about the actual assistance the defendant-informant provided.
2. Corroboration of witness testimony through independent means such as telephone records, hotel receipts, and drug ledgers.
3. Whether or not the defendant-informant's assistance led to co-defendant guilty pleas, new prosecutions or new convictions.
4. How big a role the defendant-informant played in the assistance.

The subjective factors would be:

1. Identification of why the defendant-informant is cooperating. (The factors motivating the defendant-informant affect whether and how much the witness can be trusted. For example, a defendant-informant motivated by money could — when valuable information is scarce — become "creative" in order to maintain the flow of funds.)[111]
2. The assistance significance, usefulness, truthfulness, completeness, reliability, nature, extent, risk and timeliness.[112]
3. An assessment of the credibility of the witnesses through factors such as the appearance of each witness on the stand, the witnesses manner of testifying, the reasonableness of the witnesses testimony, the opportunity the witness had to hear, see and know the things concerning which he testified to, the accuracy of the witnesses memory, the frankness or lack thereof, the intelligence of the witness, the interest and bias of the witness, if any, together with all the facts and circumstances surrounding the testimony.[113]
4. A comparison of the level of the conspirator to the kind of assistance he or she provided to the government. This would assure that higher level participants do not

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whether the cooperation of a given defendant is "substantial" — and therefore warrants a substantial assistance departure motion — are unaddressed. *See* Maxfield, *supra* note 38, at 3.

110. The formulation of this totality of the circumstances test was analogized from the Supreme Court's holding in Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that the question of whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances).

111. HUEH NUENT ET AL., INSTITUTE FOR LAW AND JUSTICE, MANAGING CONFIDENTIAL INFORMANTS 18 (1991).

112. These factors, which are stated in the guideline policy statement in §5K1.1, provide guidance for the judge in deciding upon the sentence departure. Maxfield, *supra* note 38, at 16.

113. *Judge George J. Limbert*, *supra* note 101.

get more or better mitigation through cooperation. Therefore, information from high, middle, and low level defendant-informants would be of equal value toward the result of guilty pleas, new prosecutions, new convictions and other benefits to the government.

When evaluating these factors, the interrelationship between them must also be considered. Of particular importance is the interrelationship between the defendant-informant's subjective motive and the objective facts surrounding his cooperation. This totality of the circumstances two-part test actually incorporates the defendant-informant's subjective purpose into the analysis, as well as measuring proper and improper subjective intent, through objective facts. Thus, magistrate judges would always examine both the objective facts and the defendant-informant's subjective motives in assessing whether or not the defendant-informant's cooperation rises to the level of substantial.

Thereafter, the magistrate judge would determine whether or not the defendant-informant provided substantial assistance by a preponderance of the evidence.[114] The evidence presented at the hearing would have to meet the preponderance of the evidence standard in both the objective and subjective factor groupings, since both objective and subjective analysis is important in evaluating the defendant-informant's substantial assistance. The magistrate judge would then provide a report and recommendation to the Article III federal judge for consideration during the sentencing hearing of the defendant-informant.[115] Since the term "substantial assistance" is not defined in the statute, the report and recommendation would consist of a written opinion of the magistrate judge's determination of the defendant's substantial assistance. Consequently, the definition of "substantial assistance" would develop over time through the common-law case process.

VI. CONCLUSION

The competing values of equity, reliance and fairness to the defendant-informant are hard to satisfy. While the government motion requirement tries to further these values, it undermines them because the government motion requirement merely shifts sentencing discretion from the judge to the prosecutor. An evaluation of the problems associated with shifting this discretion to the prosecutor, leads to the conclusion that the ultimate discretion over whether the defendant should receive a substantial assistance departure motion, must rest with a neutral and detached magistrate judge. Under the

114. The preponderance standard is sufficient, because it reduces the likelihood of errors. Furthermore, the preponderance standard is the easiest to quantify. "By definition, the preponderance standard requires that the trier-of-fact believe that the proposition is more probably true than not. Therefore, the probability of truth must be greater than fifty percent." Timothy J. Martens, *The Standard of Proof for Preliminary Questions of Fact Under the Fourth and Fifth Amendments*, 30 ARIZ. L. REV. 119, 121 122 (1988).

115. *Judge George J. Limbert, supra* note 101.

proposed pre-sentence substantial assistance hearing, the prosecutor's discretion is limited, thus placing §5K1.1 more in line with the goals of the Sentencing Reform Act. Furthermore, the chances of sentence disparity are reduced, since the formulation of substantial assistance would be consistently applied across federal districts. Finally, the substantial assistance determination would now be subject to judicial review.